RN

No. 84-1274

In the Supreme Court of the United States

OCTOBER TERM, 1985

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, PETITIONER

v.

DIMENSION FINANCIAL CORPORATION, ET AL.

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING AFFIRMANCE**

CHARLES FRIED
Acting Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
JOHN F. CORDES
FREDDI LIPSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT M. KIMMITT
General Counsel
MARGERY WAXMAN
Deputy General Counsel
MARY ANN GADZIALA
Senior Counsel for Banking
Department of Treasury
Washington, D.C. 20220

QUESTION PRESENTED

The Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.*, permits the Federal Reserve Board to impose certain requirements on the acquisition, operation, and control of a subsidiary that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. 1841(c). The question presented is whether the Federal Reserve Board may extend its regulatory authority to institutions that accept deposits subject to "negotiable orders of withdrawal" or that conduct transactions outside the sphere of traditional commercial lending, based on the Board's determination that regulation of these institutions would advance the purposes of the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases – Continued:

Page

Statutes and regulations:

Page

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1274

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DIMENSION FINANCIAL CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. 1841 *et seq.*, regulates the activities of bank holding companies "to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit." S. Rep. 91-1084, 91st Cong. 2d Sess. 24 (1970). It permits the Board of Governors of the Federal Reserve System (the Federal Reserve Board) to impose certain requirements on companies that control a specific class of financial institutions that Congress has determined are of central importance to the Nation's commercial credit resources. Congress, through Section 2(c) of the BHCA, has carefully defined that class by two pertinent attributes, including within it any banking institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. 1981(c). The definition thus encompasses traditional commercial banking institutions that provide conventional demand checking accounts and direct lending to business enterprises.

In 1984, the Federal Reserve Board amended Regulation Y, 12 C.F.R. 225.2(a)(1), to "clarify" the application of the BHCA (Pet. App. 20a-21a). Through these amendments, the Board attempted to extend the Act's reach by reinterpreting Section 2(c)'s definition of a "bank" to include not only conventional commercial banks that offer "demand" checking and engage in commercial lending, but also institutions (colloquially known as "non-bank banks" or NBBs) that, inter alia, offer "negotiated order of withdrawal" (NOW) accounts and conduct transactions outside the sphere of traditional commercial lending (Pet. App. 20a-61a). Numerous commentators, including the Federal Reserve Banks of San Francisco, Chicago, and Atlanta, the Comptroller of the Currency (the Comptroller) and the Federal Deposit Insurance Corporation (FDIC), objected to the Board's interpretation (see J.A. 22A-33A). It was pointed out that the Board's definition departed from the plain and accepted meaning of Section 2(c) (see J.A. 34A-38A, 39A-58A). The Board nevertheless maintained that "these interpretations are both necessary and appropriate to carry out the fundamental purposes of the Act" (Pet. App. 22a). The United States Court of Appeals for the Tenth Circuit disagreed. It has twice disapproved the Board's interpretation of Section 2(c), rejecting its "demand deposit" definition in *First Bancorporation* v. *Board of Governors*, 728 F.2d 434 (1984), and rejecting both its "demand deposit" and "commercial loan" definitions in the present case (Pet. App. 1a-19a). The Board now tests the propriety of its interpretation in this Court.

The questions raised by this case are of fundamental importance to the Nation's financial services community. They are of basic importance to the United States as well. Indeed, the Board's action intersects the United States' interests on three distinct planes, and at each intersection the Board's position is progressively more disquieting.

First, the Board's decision upsets the delicate balance that exists among government agencies charged with regulating financial institutions. The American financial services industry is perhaps the most diverse and complex in the world, consisting of a mix of approximately 50,000 institutions of-

fering a wide range of consumer and commercial services. Recognizing the importance of financial institutions to economic growth and domestic stability, Congress has subjected them to an elaborate, decentralized financial regulatory scheme, requiring the interaction and cooperation of numerous federal and state agencies.[1] These agencies operate in dynamic equilibrium to promote the stability of both individual institutions and the system as a whole.[2]

The Federal Reserve Board's amendments to Regulation Y disturb the carefully considered balance that Congress has struck. They represent an attempt by the Board to expand its authority through a redefinition of those precise statutory terms that Congress chose to delimit the Board's regulatory power. The Board's unilateral action works a basic structural change in federal banking regulation that significantly expands its regulatory authority without regard to the effects on other federal and state banking agencies and other regula-

---

[1] At the federal level alone, Congress has placed financial regulatory responsibility in seven primary agencies: the Federal Reserve Board, the Comptroller, and the FDIC for banks; the Federal Home Loan Bank Board (FHLBB) for thrift institutions; the National Credit Union Administration (NCUA) for credit unions; the Commodities Futures Trading Corporation (CFTC) for commodities and futures firms; and the Securities and Exchange Commission (SEC) for securities firms. See generally *Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services* 8, 16 (July 1984), *reprinted in* Fed. Banking L. Rep. (CCH) No. 1050 (Nov. 16, 1984); House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 1st Sess., *Formation and Powers of National Banking Associations—A Legal Primer* (Comm. Print No. 98-4, 1983) (hereinafter *National Banking Ass'ns*).

[2] For example, the Federal Reserve Board has primary responsibility with the state agencies for regulation of state-chartered member banks of the Federal Reserve System. But the Comptroller has primary responsibility for regulating national banks, including those that are subsidiaries of bank holding companies, and the FDIC shares regulatory responsibility with the states over state-chartered, federally-insured non-member banks. Additionally, Congress has consciously left many financial institutions, including mortgage companies, finance companies and insurance companies, subject primarily to the requirements of state law. This regulatory diversity reflects the Nation's historic preference for decentralized control over banking. See J. White, *Banking Law* 7 (1976).

tory regimes.[3] The United States maintains that Congress, rather than a single banking agency, has sole responsibility to make such far-reaching changes. The United States therefore responds to the Board's unusual action.

The United States' concerns do not rest solely with the Board's incursion upon other agencies' regulatory interests; more troubling is the manner by which the Board has accomplished that result. The Board has redefined statutory terms of plain meaning to expand its authority beyond what the language of its empowering statute permits. The United States agrees, of course, that a federal agency is entitled to substantial deference in its interpretation of a statute that it administers. However, the United States does not agree that a federal agency can employ unjustifiably expansive interpretive license to enlarge its regulatory powers, and then invoke the aegis of agency deference to deflect judicial disapproval. The United States believes that the traditional deference accorded a federal agency cannot supplant the Board's obligation to construe its empowering statute according to the unmistakably clear terms that Congress has employed.[4]

[3] Notably, NBBs are already extensively regulated by their chartering and insuring agencies. Thus, a federally chartered NBB is subject to all the laws, rules and regulations of the National Bank Act, 12 U.S.C. 1 *et seq.*, and the Federal Deposit Insurance Corporation Act, 12 U.S.C. 1811 *et seq.* A state-chartered federally-insured NBB is subject to regulation by its particular state and by the FDIC. Under these laws, NBBs are subject to the full supervisory and examination authority of their regulators. Transactions of an FDIC-insured NBB with its affiliates are carefully scrutinized by its primary federal regulatory under the Banking Affiliates Act of 1982, 12 U.S.C. 371c. The acquisition of a federally insured NBB by any individual or corporation is subject to the Change in Bank Control Act of 1978, 12 U.S.C. 1817(j), which requires the appropriate federal regulatory agency (the Comptroller, the FDIC, or the Board) to examine the same general financial, managerial, and competitive factors required under the BHCA. Thus, the issue in this case is not whether NBBs should be regulated, but rather the manner and scope of regulation.

[4] Because federal banking law is intricate and regulatory authority is dispersed among a number of adjacent agencies sharing a commonality of interests, each agency is under a prudential obligation to adhere closely to the terms of its empowering statutes. The complex regulatory scheme that

Finally, the United States recognizes a third concern that transcends the questions of regulatory authority and agency deference. The Federal Reserve Board's action, expanding its regulatory authority through redefinition of plain statutory language, seriously undermines the legislative process. Congress must rely on statutory language to strike its compromises and state its intentions. Thus, the legislative process can function effectively only if the participants can expect that plain language will be applied by federal agencies according to its accepted meaning. Words, of course, can be imprecise; indeed, Congress may sometimes strike a compromise through imprecision. But it is one matter to recognize that Congress may delegate authority to the Executive Branch through the use of words of uncertain content; it is quite another to treat words as empty vessels into which an agency may pour whatever meaning it feels may comport with the broad "purposes" of the underlying statute. In the view of the United States, the Federal Reserve Board has engaged in the latter activity, ignoring the unusually precise language of the BHCA based on its view of present regulatory needs. The United States, sensitive to broader governmental interests, cannot discard the plain content of the terms Congress has chosen.[5]

Thus, the United States opposes the Federal Reserve Board's expansive redefinition of Section 2(c) of the BHCA and expresses its views through this brief amicus curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

The BHCA restrains undue concentration of commercial banking resources and abuses of commercial credit by

Congress has devised requires each agency to act only within the sphere that Congress has specified. Indeed, Congress has presumably provided precise definitions of agency authority to prevent agencies from abusing their independence and overstepping their regulatory bounds.

[5] Indeed, the Board's action is particularly troubling in light of the ongoing congressional debate concerning regulation of NBBs. Numerous bills concerning regulation of NBBs have received congressional attention in the last two legislative sessions. See, *e.g.*, H.R. 20, 99th Cong., 1st Sess. (1985) (reported to the full House June 18, 1985); S. 2851, 98th Cong. 2d Sess. (1984) (passed by the Senate Sept. 13, 1984). The Board's action, no doubt, will influence the outcome of that debate by changing the status quo during the course of legislative deliberations.

regulating the activities of bank holding companies. Congress, through its 1966 and 1970 amendments to Section 2(c) of the BHCA, expressly limited the Act's application to companies exercising control over commercial banks that accept "demand" deposits and engage in the business of making commercial loans. It excluded from the Act's definition of "bank" a variety of financial institutions, such as industrial banks, that do not offer commercial banking services. Since 1970, Congress has authorized the excluded institutions to offer new services, such as NOW accounts, that bear some similarity to demand deposits. Those institutions have also become more visible participants in money market and other investment transactions. In light of these changes, the Federal Reserve Board concluded that the excluded institutions should be treated as "banks" for purposes of the BHCA, despite Section 2(c)'s plain language excepting them from coverage. The Board asserted regulatory authority by amending Regulation Y broadly to redefine the operative terms of Section 2(c) and include the otherwise excluded institutions within the Act's reach. However as the court of appeals correctly held, those amendments cannot stand. They contradict the plain meaning of the statute, are inconsistent with the BHCA's legislative history, and usurp congressional power over fundamental questions of banking policy.

Section 2(c) of the BHCA first limits the term "bank," for purposes of the Act, to institutions that accept deposits "that the depositor has a legal right to withdraw on demand." 12 U.S.C. 1841(c). The court of appeals was correct in holding that the Board's redefinition of "demand deposit" to include NOW accounts is contrary to the plain language of the BHCA. Because institutions that offer NOW accounts must, by law, reserve the right to require advance notice prior to withdrawal—whether they choose to exercise the right or not—NOW account depositors do not have a "legal right" to withdraw those funds on demand. Contrary to the Board's suggestion, Section 2(c) does not extend the Board's authority to institutions that offer the "functional equivalent" of a demand deposit. But even if it did, a NOW account would not qualify. Although a NOW account bears some similarity, as a

practical matter, to a traditional checking account, it is instead a special species of savings account. Indeed, prior to 1982, the Board had ruled consistently that NOW accounts are not "demand deposits." It continues to treat NOW accounts as savings deposits in other regulations governing interest rates and reserve requirements. Thus, its contrary treatment of NOW accounts in the recent amendments to Regulation Y is a marked departure from its own position and the conventional understanding of the financial community.

The legislative history of the BHCA indicates that Section 2(c)'s demand deposit requirement was incorporated to exclude institutions that presently are authorized by Congress to offer NOW accounts. Congress chose its specific language, based on a "legal right to withdraw funds," to ensure that there would be no uncertainty concerning the reach of its exclusion. If Congress had intended that the Board should have wide-ranging authority to determine what institutions should now be covered by the BHCA, it would not have used such specific definitive language.

Section 2(c) of the BHCA further limits the term "bank" to only those "demand deposit" institutions that also "engage[] in the business of making commercial loans." 12 U.S.C. 1841(c). Congress used the term "making commercial loans," as it is commonly employed, to describe face-to-face loans from banks to business enterprises. The Board's regulations, defining "commercial loan" to include a broad range of passive investments, secondary market transactions, and interbank transfers, is contrary to the accepted meaning of the term. Indeed, the Board itself, until recently, had consistently refused to treat those transactions as "commercial loans." Nor can the Board's definition be squared with the purposes and legislative history of the Act. The BHCA was intended to protect against the use of commercial credit to advance anticompetitive practices between bank and the nonbank subsidiaries of bank holding companies. Face-to-face commercial lending, as conventionally understood, is susceptible to these types of abuses. However, the transactions included within the Board's definition, occurring largely in the secondary

money market, do not present the same potential for abusive practices. Indeed, the legislative history reveals that institutions that Congress clearly intended to exempt from the BHCA's coverage engaged in the transactions the Board now defines as commercial loans.

The Board ultimately defends its besieged effort to rewrite Section 2(c) by claiming that its judgment is entitled to judicial deference. But deference is inappropriate when an agency adopts a position plainly at variance with the statute it administers. The Board's claim to deference is further undermined by the fact that other federal banking agencies, equally involved and familiar with the intricacies of banking, disagree with the Board's interpretation of the BHCA. Nor can the Board's action be justified as necessary to prevent evasions of the Act. The Board's authority to police the boundaries of the Act does not empower it to redraw the borders that Congress has demarked. The Board's actions in the present case represent an unauthorized assumption of major policy decisions that are properly the province of Congress. Indeed, financial institutions that Congress had previously exempted from the Act would be swept back within its coverage.

Plainly, the financial services industry has undergone substantial changes since Congress formulated its definition of a "bank" for purposes of the BHCA. However, these changes are largely the result of Congress's deregulatory legislation, expanding the types of financial services that are available to the public. One can debate the proper scope of the BHCA in this new environment. But regardless of how one views that debate, it remains clear that Congress, rather than the Board, is the proper body to determine the reach of the Act.

ARGUMENT

FINANCIAL INSTITUTIONS THAT ACCEPT DEPOSITS SUBJECT TO A NEGOTIABLE ORDER OF WITHDRAWAL AND THAT CONDUCT TRANSACTIONS OUTSIDE THE SPHERE OF TRADITIONAL COMMERCIAL LENDING ARE NOT "BANKS" WITHIN THE MEANING OF SECTION 2(c) OF THE BANK HOLDING COMPANY ACT.

The BHCA subjects "any company which has control over any bank" (12 U.S.C. 1841(a)(1)) to extensive regulation. Thus, the definition of the term "bank" is central to the scope of the Act. Section 2(c) of the BHCA, as originally enacted, defined the term "bank" to include "any national banking association or any State bank, savings bank, or trust company." 12 U.S.C. (Supp. V 1953-1958) 1841(c); see Ch. 240, § 2(c), 70 Stat. 133. However, in 1966, Congress replaced the "charter" definition with a narrower test limited, in relevant part, to "any institution that accepts deposits that the depositor has a legal right to withdraw on demand." 12 U.S.C. (Supp. II 1965-1966) 1841(c); see Pub. L. No. 89-485, § 3, 80 Stat. 236. In 1970, Congress enlarged the Act's coverage to include one-bank holding companies but further narrowed the definition of "bank" to include only those domestic institutions that "accept[ ] deposits that the depositor has a legal right to withdraw on demand" *and* "engage[ ] in the business of making commercial loans." 12 U.S.C. 1841(c); see Pub. L. No. 91-607, § 101(c), 84 Stat. 1762.

In 1984, the Federal Reserve Board amended Regulation Y, governing application of the BHCA, to "clarify" the Act's definition of a "bank." See 49 Fed. Reg. 833 (1984) (see Pet. App. 20a-61a). Through these amendments, the Board responded to what it viewed as unwelcome changes in the financial services industry, including an expansion in the powers of industrial banks and the corporate acquisition of financial institutions offering limited depository and lending services (Pet. App. 24a-25a). The Board's amendments essentially redefined the statutory definition of a "bank" for purposes of the BHCA, providing (12 C.F.R. 225.2(a)(1)):

(A) "Deposits that a depositor has a legal right to withdraw on demand" (hereinafter "demand deposits") means any deposit with transactional capability that, as a matter of practice, is payable on demand and that is withdrawable by check, draft, negotiable order of withdrawal, or other similar instrument; and

(B) "Commercial loans" means any loan other than a loan to an individual for personal, family, household, or charitable purposes, and includes the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest-bearing funds.

This definition conflicts with the plain language and the legislative history of Section 2(c). It cannot be justified as an exercise of the Board's authority to administer the Act.

A. The Board's Expansive Redefinition of its Regulatory Authority is Inconsistent with the Plain Language and Legislative History of Section 2(c).

The Federal Reserve Board, like any federal agency, is bound by the terms of its empowering statute. Thus, the initial question in this case is whether Section 2(c) provides a conclusive definition of the term "bank." If the statutory definition provides a full expression of Congress's intent, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 4. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981).

The principles for determining congressional intent are familiar. See, *e.g.*, *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). The "starting point must be the language used by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). "Absent a clearly expressed legislative intention to the contary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In examining that language, it must be assumed that " 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello* v. *United States*, 464 U.S. 16, 21 (1983), quoting *Richards* v. *United States*, 369 U.S. 1, 9, (1962). Thus, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

In defining the term "bank" for purposes of the BHCA, Congress used precise words of accepted meaning that leave no room for administrative "clarification." The Board's regulations cannot be reconciled with the unambiguous import of those words. The legislative history does not support a contrary conclusion; indeed, it confirms that Congress held no intention that the Board should expand the carefully chosen statutory terms beyond their plain meaning.

1. Section 2(c) states, as the first element of its definition, that a "bank" must accept deposits that "a depositor has a legal right to withdraw on demand." 12 U.S.C. 1841(c). As Congress recognized and the Board concedes (Pet. Br. 28), this formulation is a precise legal description of a conventional "demand deposit" checking account. It does *not* describe a NOW account, which, by definition, gives the depositor *no legal right* to withdraw on demand.[6] Nor does it describe "any deposit with transactional capability that, *as a matter of practice*, is payable on demand." 12 C.F.R. 225.2(a)(1)(A) (emphasis added). A "legal right" simply cannot be equated with a custom or practice. Thus, the plain lan-

[6] NOW accounts, like traditional savings accounts, are universally subject to a prior notice of withdrawal requirement and distinguished from "demand deposits" on that basis. See P. Heller, *Handbook of Federal Bank Holding Company Law* 6 n.21 (1976); *National Banking Ass'ns*, at 3-5; 12 C.F.R. 217.1(e), 217.135. See also, *e.g.*, Colo. Rev. Stat. § 11-22-108(a) (Supp. 1983); Fla. Stat. Ann. § 664.08(1) (West 1985); R.I. Gen. Laws §§ 19-20-9(a) and (b), 19-20-21 (1982). There is no merit to the Board's argument (Pet. Br. 31-32) that a NOW account depositor "does in fact have a legal right to withdraw funds" until the notice requirement is invoked. The same could be said of a savings account notice requirement, but the Board clearly recognizes that Congress intended to exclude from its definition "savings accounts which were in practice paid on demand" (*id.* at 29).

guage of Section 2(c) prohibits the Board's expansive redefinition of the term "bank."

The Board justifies its redefinition on the ground that a NOW account is the "functional equivalent" of a conventional checking account (Pet. Br. 26-27, 33). But Section 2(c) does not speak in terms of "functional equivalence." Instead, it defines a "bank" based on the depositor's "legal right to withdraw on demand." If Congress had intended that a "bank" should be defined according to "functional equivalence" it would have, at a minimum, incorporated into its statutory definition terms of sufficient generality to support the Board's expansive construction. Congress instead used precise language that, by its terms, includes conventional checking accounts but *excludes* what the Board describes as "functionally equivalent" depository accounts. Thus, the express language of Section 2(c) rebuts the Board's statement (Pet. Br. 27-28) that Congress "intended to create a functional test for delineating the kind of deposits covered by the Act."

In all events, the NOW accounts are not "functionally equivalent" to conventional checking accounts. A NOW account bears only one similarity to conventional checking—it permits the depositor to write negotiable drafts, payable to third parties, on the account. In all other respects it resembles a savings account. For example, NOW accounts bear interest, are not available to corporations operated for profit, and are subject to the institution's right to require notice prior to withdrawal. See 12 U.S.C. 1832; 12 C.F.R. 217.1(e), 217.135.[7] These characteristics support the generally held commercial understanding that NOW accounts are a "special type of savings account. See *National Banking Ass'ns*, 3-5; see also P. Heller, *supra*, at 6 n.21.[8] Indeed, until recently, the Board itself wholeheartedly sub-

[7] The Board argues that the notice requirement "can never be practicably invoked with regard to NOW accounts," because of the potential "damage to the reputation of the institution and loss of customer good will" (Pet. Br. 32). It then speculates (*id.* at 32 n.32) that these disincentives do not exist with respect to passbook savings accounts. But both accounts are subject to the *same* notice requirements. See 12 C.F.R. 217.5(a) and 329.5(a). Invocation of the notice requirement, effectively freezing withdrawals, will impair customer goodwill regardless of whether depositors or third party payees are affected. Thus, the Board's suggestion that institutions would be more inclined to invoke the notice requirement with respect to traditional savings accounts than NOW accounts appears doubtful. Indeed, under the Board's regulations, an institution cannot elect to invoke its right to notice on passbook withdrawals but withhold that requirement on NOW account withdrawals. See *ibid.* Since most institutions offer both forms of savings accounts, it is misleading to suggest that exercise of the notice requirement is practicable with respect to one account but not the other. In any event, the validity of the right to demand notice is not diminished simply because the right is rarely invoked and only serious circumstances will lead to its exercise.

[8] NOW accounts have evolved as a variation of the traditional savings account. State regulated savings banks in New England initiated the NOW concept in the early 1970s by permitting savings account depositors to make third party withdrawals from their accounts. See Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, 91 Bank. L. J. 439 (1974). In 1973, Congress authorized NOW accounts, on a trial basis, in those states, while limiting their use elsewhere. Pub. L. No. 93-100, § 2, 87 Stat. 342. In 1980, Congress authorized their introduction on a nationwide basis. See Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 96-221, § 303, 94 Stat. 146. Although Congress clearly recognized that NOW drafts could be used in place of checks (see S. Rep. 96-368, 96th Cong., 1st Sess. 5 (1979)), it was also mindful of the differences between NOW accounts and traditional checking accounts, noting that "[u]nder the definition of a NOW account, a depository institution may require a depositor to give 30 days notice before withdrawal from a NOW account is made, similar to the notice requirement on any savings account, although such notice may not be required in practice" (*id.* at 7). See also *id.* at 8-9 (describing NOW accounts and credit union share draft accounts as "savings-type accounts [accessible] through draft instruments"). Indeed, the Board itself had testified that "NOW account[s] * * * can be regarded as a form of savings account." *The Consumer Checking Account Equity Act of 1979: Hearings on H.R. 3864 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. 88 (1979) (statement of Hon. Charles Partee, member, Board of Governors, Federal Reserve System). Commentators and courts have consistently recognized that a NOW account is a hybrid species of savings account rather than a checking account. See P. Heller, *supra*, at 6 n.21; Kaplan, *supra*, at 444-445; Comment, *The Negotiable Order of Withdrawal (NOW) Account: "Checking Accounts for Savings Banks?,"* B.C. Indus. & Com. L. Rev. 471, 486-487 (1973); *Pennsylvania Bankers Ass'n* v. *Secretary of Banking*, 481 Pa. 332, 337-338, 392 A.2d 1319, 1321-1322 (1978).

scribed to that understanding. It repeatedly held that institutions such as guaranty savings banks, which offer NOW accounts, "are not banks within the meaning of the [BHCA] since they do not accept demand deposits and engage in the business of making commercial loans." *First Financial Group of New Hampshire, Inc.* 66 Fed. Res. Bull. 594 (1980); see *Heritage Banks, Inc.*, 66 Fed. Res. Bull. 917 (1980); *Heritage Banks, Inc.*, 66 Fed. Res. Bull. 590 (1980). See also *D. H. Baldwin Co.*, 63 Fed. Res. Bull. 280, 286 (1977) (noting that savings and loan associations which offer NOW accounts, are not "banks" within the meaning of the BHCA). Its recent amendments to Regulation Y reverse a consistent twelve-year practice of regulating NOW accounts as savings deposits, a practice that remains in effect under other provisions of the Board's regulatory program.[9]

Thus, the plain language of the BHCA, reinforced by commercial understanding and the Board's own past practices, demonstrates that NOW accounts are not deposits that "a depositor has a legal right to withdraw on demand." While "it is not necessary to look beyond the words of the statute," *TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978), the legislative history of Section 2(c) provides still further confirmation that the Board's interpretation is erroneous and manifestly contrary to congressional intent.

[9] Upon passage of Pub. L. 93-100, *supra*, the Board "propose[d] to treat the NOW account as a form of savings deposit." See 38 Fed. Reg. 26468 (1973). The Board, together with the FDIC and the FHLBB, subsequently issued regulations specifically categorizing NOW accounts as savings deposits rather than demand deposits, recognizing that the notice of withdrawal requirement distinguishes a NOW account from a demand deposit account. 38 Fed. Reg. 34457-34459 (1973). The Board has adhered to this distinction from 1973 to the present in Regulation Q, regulating interest rates, and Regulation D, regulating reserve requirements. For example, Regulation Q defines a "demand deposit" as "every deposit that is not a 'time deposit,' 'international banking facility time deposit,' or 'savings deposit,' as defined in this section." 12 C.F.R. 217.1(a). It then defines a "savings deposit" as including "[d]eposits subject to negotiable orders of withdrawal." See 12 C.F.R. 217.1(e)(3)(1). Regulation D establishes analogous definitions. See 12 C.F.R. 204.2(b)(1) and (d)(1)(i)(A). The Board's 1984 revision of Regulation Y, treating NOW accounts as demand deposit accounts, stands in marked departure from Regulations Q and D.

The legislative history reveals that Congress refined Section 2(c)'s definition of "bank" to ensure that industrial banks and similar institutions would be excluded from the Act. The original version of Section 2(c) defined "bank" to include "any national banking association or any State bank, savings bank, or trust company." 12 U.S.C. (Supp. V 1953-1958) 1841(c). But Congress intended the definition to include "commercial banks only." 102 Cong. Rec. 6957 (1956). The Board nonetheless construed the statutory definition to include industrial banks, despite its own acknowledgment that the BHCA's legislative history "indicated that the Act was directed principally at control of 'commercial' banks," and that industrial banks were generally "not regarded as being engaged in commercial banking." *Applicability of the Bank Holding Co. Act to Industrial Banks*, 49 Fed. Res. Bull. 165, 166 (1963).[10] Congress, in response, specifically overruled the Board's interpretation by amending Section 2(c) to provide a more precise definition of a "commercial bank" that would "exclude institutions like industrial banks and nondeposit trust companies." S Rep. 89-1179, 89th Cong., 2d Sess. 7 (1966).[11] Section 2(c)'s reliance on a depositor's "legal right to

[10] The Board adopted a "functional" approach similar to the approach it advances in the instant case. It ruled that acquisition of an industrial bank would be subject to the BHCA if the industrial bank "accepts deposits subject to check or otherwise accepts funds from the public that are, in actual practice, repaid on demand, as are demand or savings deposits held by commercial banks." *Ibid.* The Board reaffirmed that approach in *Industrial Banks as "Banks" Under the Bank Holding Company Act*, 51 Fed. Res. Bull. 1539 (1965), stating that the BHCA was applicable to the acquisition of an industrial bank issuing investment certificates that were "in actual practice, repaid on demand." *Id.* at 1540.

[11] The evolution of the amended definition is apparent. The American Industrial Bankers Association proposed that Section 2(c) be amended specifically to exclude industrial banks from the BHCA's coverage. *Amend the Bank Holding Company Act of 1956: Hearings on S. 2353, S. 2418, and H.R. 7371 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 157 (1966) (hereinafter *1966 Hearings*). The Chairman of the Senate Committee requested the Board's views on the matter. The Board responded that there was "no reason in policy to cover such institutions" and suggested that industrial banks and similar institutions could be excluded by defining "bank" to include only those institutions that

withdraw" represents a congressional formulation of a clear boundary separating traditional commercial banks from industrial banks and like institutions.[12] The Board, invoking "policy" concerns, simply seeks to redraw the line that Congress has laid down.

2. Section 2(c) states, as the second element of its definition, that a "bank" must "engage in the business of making commercial loans." 12 U.S.C. 1841(c). As in the case of the "demand deposit" element, the Board has expanded the statutory requirement far beyond the "ordinary meaning of the words used." *Russello*, 464 U.S. at 21.[13] The "making of commercial loans," as the constituent words denote, involves the negotiated extension of credit to a business enter-

accept "deposits payable on demand." *Id.* at 447. The Board noted that this definition would exclude industrial banks because they "accept funds that are, *in actual practice*, repaid on demand." *Ibid.* (emphasis added). Congress modified the Board's suggested language to include only those institutions that "accept deposits that a depositor has a legal right to withdraw on demand." The reason for this change seems clear: Congress no doubt recognized that accounts "payable on demand" might be interpreted to include accounts "in actual practice, repaid on demand." It sought to clarify the Board's distinction between accounts legally payable on demand from those in practice paid on demand through a test that expressly relied on the depositor's *legal right* to withdraw on demand. Remarkably, the Board now urges against that distinction, which *it* first proposed.

[12] The Board is simply wrong in suggesting (Pet. Br. 29-31) that the "demand deposit" requirement reflects a congressional determination that all institutions offering accounts "withdrawable by check" should be treated as commercial banks. Congress was concerned solely with formulating a test that would distinguish between traditional commercial banks and other institutions. See S. Rep. 89-1179, *supra*, at 7. The Board itself suggested that the "demand deposit" requirement is "a simple and widely accepted test" for drawing that distinction. 112 Cong. Rec. 12386 (1966). Nothing in the legislative history suggests that Congress wished to regulate institutions *because* they offered checking accounts or their "functional equivalents." Indeed, the infirmity of the Board's position is best demonstrated by its result. As the Board admits (Pet. Br. 12-13, 31 n.29), its formulation would sweep within the coverage of the BHCA the very institutions that Congress specifically sought to exclude.

[13] Commercial terms are presumed to be used in their trade or commercial meaning. See 2A *Sutherland Statutory Construction* § 47.31 at 155 (4th ed. 1973).

prise.[14] It does not include the broad range of money market transactions and interbank transfers—including purchase of retail installment loans, commercial paper, certificates of deposit, and bankers' acceptances, extension of broker call loans, sale of federal funds and deposit of interest bearing funds—that the Board has swept within its amended Regulation Y.

At bottom, the Board contends that any transaction qualifies as a commercial loan if it "establishes a debtor-creditor relationship and results in an extension of credit and * * * the beneficiaries of these transactions are not individuals but rather corporations that utilize the funds for business purposes" (Pet. Br. 39; Pet. App. 48a). But the Board fails to explain the source of this novel and indecipherably vague definition. The Board's definition certainly does not conform to the "ordinary contemporary, common meaning" of the words Congress used. *Perrin*, 444 U.S. at 42. The term "commercial loans" finds a far more narrow, firmly established, and well understood usage in the banking community. Commercial loans are face-to-face agreements that a bank undertakes "to supply the credit needs of business enterprises, including farm operations, in its community." H. Crosse & G. Hempel, supra, at 176. "Commercial loans tend to be large and complex, requiring careful credit analysis and loan structuring." F. Johnson & R. Johnson, 158 (1985). They occupy a "privileged position" in a bank's loan portfolio because "bankers believe proper accommodation of commercial and industrial borrowers is essential to maintain a bank's lending base in the form of commercial deposits." D. Hodgman, supra, at 19. Section 2(c) was intended to refer

[14] *E.g.*, D. Jaffee, *Credit Rationing and the Commercial Loan Market* 3 (1971) ("The term *commercial loans* generally refers to credit of short term maturity extended by commercial banks to business. The collateral for this credit is typically a short term asset such as inventory stock or accounts receivable.") (footnote omitted; emphasis in original); see also, *e.g.*, F. Johnson & R. Johnson, *Commercial Bank Management* 158-186 (1985); H. Crosse & G. Hempel, *Management Policies for Commercial Banks* 176-180 (1973); American Bankers Ass'n, *The Commercial Banking Industry* 121-161 (1962). See generally, D. Hodgman, *Commercial Bank Loan and Investment Policy* (1963).

to this broadly embraced usage of the term "commercial loans."[15]

Government and private sectors of the banking community have criticized the Board's amended definition as inconsistent with commercial practice and understanding.[16] As the commentators pointed out, the Board itself had recognized and adhered to the common usage of the term "commercial loan" for over a decade, and its new definition marked a "radical," "abrupt," and "profound" departure from its own past practices.[17] Indeed, prior to its amendments to Regulation

---

[15] Curiously, the Board seeks support for its definition (Pet. Br. 39; Pet. App. 48a) in this Court's observation that "[c]ommercial loans, generally speaking, are relatively short-term loans to business enterprises of all sizes, usually for purposes of inventory or working capital." *United States* v. *Connecticut Nat'l Bank*, 418 U.S. 656, 665 (1974). The Court's observation conforms precisely to the type of loan described in the text. See, *e.g.*, *F. Johnson & R. Johnson, supra*, at 161-164 (describing the characteristic cyclic relationship between commercial loans, inventory, and working capital). Indeed, the Court's observation was made in reference to the type of face-to-face transactions that we have described. See App. at 170-173, 487-488, 2331-2355, *United States* v. *Connecticut National Bank*, No. 73-767.

[16] For example, the Comptroller described the Board's definition as "an abrupt and profound departure from the Board's past interpretations of the term" (J.A. 75A) that "is not supported by either the general purpose of the BHCA or the specific purpose of the 1970 narrowing of the definition of the term 'bank' " (J.A. 77A). The FDIC objected to the Board's policy decision, though not to its authority to make such rules, stating that the Board "has dramatically recast the definition of commercial loan" and made "a radical departure from the traditional view of what constitutes a commercial loan" (J.A. 91A). The regulated community likewise strenuously objected to the Board's definition. See, *e.g.*, J.A. 37A, 39A, 49A-57A.

[17] The Board's justification for its definition of a commercial loan, even before this Court, is unconvincing. For example, the Board claims (Pet. Br. 44) that this Court's decision in *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), supports its particular assertion that commercial paper is a commercial loan. However, that case simply notes the undisputed fact that commercial paper results in an extension of credit. Slip op. 20 & n.11. Indeed, the Board's failure to recognize basic distinctions between these commercial loans and commercial paper is well illustrated by Professor Hodgman's comparison (*Commercial Bank Loan and Investment Policy, supra*, at 125-126):

Y, the Board generally had described the transactions at issue as activities only "closely related" to banking. See 12 C.F.R. 225.4 (1975). Additionally, the Board repeatedly indicated that the transactions now at issue were not commercial loans. For example, the Board advised the Vice President of the Federal Reserve Bank of Boston, through a May 18, 1972 letter (J.A. 93A), that Boston Safe Deposit and Trust Company (Boston Safe) did not fall within Section 2(c)'s definition of a bank, stating (J.A. 94A):

> The Board understands that Boston Safe purchases "money market instruments," such as certificates of deposit, commercial paper, and bank acceptances. In the circumstances of this case, such transactions are not regarded as commercial loans for the purposes of the Act.
>
> * * * * *
>
> A further aspect of Boston Safe's operations is its engagement in Federal funds transactions * * *. The Board has concluded * * * that the sale of Federal funds by Boston Safe is not tantamount to the making of a commercial loan, for purposes of the Act.

> Despite the[ ] similarities in the bank loan market and the commercial paper market there is one significant difference * * *: the commercial paper market is impersonal in its negotiations because of the intervention of commercial paper brokers between buyers and sellers. This is in marked contrast to the direct negotiations between bank and customer in the bank loan market. * * * The close similarity in the relative movements of the commercial paper rate and the rate on Treasury bills [citing a graph] supports the institutional evidence that the commercial paper rate is determined under strongly competitive conditions.

See also, *e.g.*, Hurley, *The Commercial Paper Market*, 63 Fed. Res. Bull. 525 (1977). The Board also fails to recognize (Pet. Br. 44 n.55) that commercial paper, though often directly placed, is traded in a competitive market and, like all money market instruments, is subject to arbitrage. Likewise, its comparison to participation loans (*ibid.*) neglects to mention the comprehensive agreements among the lead and participating banks that distinguish these loans from market investments. As respondents note (Br. in Opp. 22-25), the Board's inclusion of other money market instruments and interbank transfers is even more difficult to justify.

The Board subsequently followed that reasoning in a variety of different contexts.[18] The Board now dismisses these decisions as simply "represent[ing] a willingness by the Board to refrain from applying the full scope of the Act in conditions that did not appear to generate the potential for its evasion" (Pet. App. 60a). However, the Board's past decisions make no mention of self-imposed restraint; instead, it appears that the Board has actually abandoned the reasonable and, indeed, self-evident interpretation of the statutory language, finding its novel definition of "commercial loan" preferable to that

[18] For example, the Board's Legal Division later advised Bradford Computer Systems, Inc., through a January 26, 1976 letter (J.A. 99A), that a broker call loan "is distinguishable from the ordinary commercial loan in that such call loans are entered into on a daily renewable basis, with both parties having the option not to renew, are made primarily as a method of investing idle funds, and are viewed by the lending institution as an alternative to purchase of money market instruments such as commercial paper or bankers' acceptances" (J.A. 101A). The Board's Legal Division advised the Federal Reserve Bank of Boston, through a November 13, 1980 letter (J.A. 104A), that the purchase of government guaranteed loans would not constitute "making commercial loans" because it "appears to be a passive medium of investment" that "do[es] not appear to involve the particular type of lender-borrower relationship that is characteristic of commercial loans" (J.A. 105A; see also *id.* at 96A-98A). The Board expressed similar views in other cases. See *D. H. Baldwin Co.*, 63 Fed. Res. Bull. 280, 286 (1977) (savings and loan institutions that engage in federal funds transactions are not banks within the meaning of Section 2(c)); *American Fletcher Corp.*, 60 Fed. Res. Bull. 868, 869 & n.8 (1974).

The Board adhered to these interpretations through early 1981. For example, it advised Gulf & Western Corporation, through a March 12, 1981 letter (J.A. 110A), concerning a subsidiary's acquisition of Fidelity National Bank (FNB), that FNB would not be a bank for purposes of Section 2(c) "since it ha[d] divested itself of its commercial loan portfolio" and had taken other action to avoid commercial loan involvement (J.A. 111A). The first appearance of a change in the Board's position occurred shortly thereafter, when the Chrysler Corporation requested the Board's views on Chrysler's proposal to form a subsidiary, for automotive financing purposes, that would make the same commitment to forego commercial loan activities. The Board advised Chrysler through a May 28, 1981 letter ([1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 98,770) that the financing company would not be a bank provided that it also avoided purchase of "commercial paper and banker's acceptances," suggesting that these instruments "could be used as substitutes for commercial loans." *Ibid.* However, the Board expressly permitted Chrysler to invest in certificates of deposit. *Ibid.*

which the plain language provides.

The legislative history fully supports interpretation of "commercial loan" according to its plain meaning.[19] In 1966, Congress narrowed the BHCA's definition of a "bank" to include only those institutions that accepted "demand deposits" (see discussion, pages 15-16 *supra*). By 1970, Congress had recognized that this definition was still too broad, and therefore added the "commercial loan" requirement. As the Senate Report explained (S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970)):

> The definition of "bank" adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the business of making commercial loans from the definition of "bank."

The discussion of commercial loans in the context of commercial banks is revealing; it demonstrates that Congress understood and used the term "commercial loan" in the same sense

[19] In amending Regulation Y, the Board rejected a definition based on "those transactions traditionally denominated 'commercial loans,'" claiming that "[t]here is nothing in the legislative history that supports such a proposition" (Pet. App. 47a; see Pet. Br. 44). Not only is this statement wrong, it completely ignores "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a *clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 108 (emphasis added). Thus, it is *the Board* that must show some compelling basis for departure from the plain language of the statute. See *TVA* v. *Hill*, 437 U.S. at 187 n.33. See also *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, No. 82-2056 (May 16, 1984), slip op. 6; *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

that it was employed by commercial banks. Congress plainly did not express any intention that the term should receive a definition other than that applied in ordinary commercial usage.

The Board contends (Pet. Br. 41) that the "commercial loan" requirement should not be applied according to its plain meaning because it "was a technical amendment to the Act designed to create a narrowly circumscribed exclusion from the Act's coverage," noting that a particular institution, Boston Safe, proposed the requirement.[20] Congress was fully aware that Boston Safe actively campaigned for and would benefit from the amendment, but there is no indication that Congress intended to benefit only Boston Safe; indeed, both the statute and the Senate Report speak of the "commercial loan" requirement as a limitation of general applicability.[21]

[20] Boston Safe, which accepted demand deposits but made loans only as a courtesy to trust customers, first urged the amendment in 1966. See *1966 Hearings*, 732-733 (Letter from William Wolbach, President, The Boston Co., Inc., to Sen. A. Willis Robertson, Chairman, Senate Comm. on Banking and Currency (Apr. 28, 1966)). See also 112 Cong. Rec. 12385-12386 (1966). In 1970, Senator Brooke of Massachusetts introduced a bill to amend the BHCA that included, presumably at Boston Safe's urging, the "commercial loan" requirement. See S. 3823, 91st Cong., 2d Sess. § 21(c) (1970), *reprinted in* 116 Cong. Rec. 14821 (1970). The Senate Committee on Banking and Currency included the "commercial loan" requirement in the Senate bill, see S. Rep. 91-1084, *supra*, at 24, and the Senate and House conferees included the requirement in the final bill. See 116 Cong. Rec. 42426 (1970) (comments of Senator Sparkman); Act of Dec. 31, 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1762. See also P. Heller, *Handbook of Federal Bank Holding Company Law* 10 n.30 (1976).

[21] The Board, in its review of the "commercial loan" requirement contained in S. 3823, stated, "To the best of our knowledge, this amendment would have very limited application at present, possibly affecting only one institution." Letter from J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System, to Sen. John Sparkman, Chairman, Senate Comm. on Banking & Currency (June 1, 1970), *reprinted in "One-Bank Holding Company Legislation of 1970," Hearings Before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 136-137 (1970) (hereinafter *1970 Hearings*). The Board's recitation of this statement (Pet. Br. 41) is slightly mistranscribed and omits inclusion of the phrase "at present." The passage, correctly quoted, confirms that the Board viewed the "commercial loan" requirement as a limitation of general applicability. Likewise the Board has incorrectly attributed a statement to Rep. Gonzalez

Moreover, the congressional intention to exclude Boston Safe through the "commercial loan" requirement confirms the plain meaning of the term "commercial loan." As the Board acknowledges (Pet. Br. 43), Boston Safe was engaged in the very type of money market transactions that the Board now claims are "commercial loans."[22]

The Board argues further that the "commercial loan" requirement should be construed more broadly than its accepted meaning because other 1970 amendments to the BHCA "substantially reaffirmed and strengthened the regulatory framework of the Act" (Pet. Br. 42). How-

that Boston Safe was "[v]irtually the only bank that does no commercial lending" (*ibid.*). That statement actually appeared in a lengthy banking journal article that Rep Gonzalez entered into the record. See 116 Cong. Rec. 25846-25849 (1970).

[22] As previously discussed (see page 19, *supra*), Boston Safe purchased certificates of deposit, commercial paper and bankers' acceptances, and participated in the federal funds market. See J.A. 93A-95A; see also Financial Statement of Boston Safe Deposit & Trust Co. (Dec. 31, 1970), *summarized in* Moody's Investor Service, Inc., *1972 Moody's Bank and Finance Manual* 663-664 (stating that, as of Dec. 31, 1970, Boston Safe had $37,250,000 invested in short-term market investments); Financial Statement of Boston Safe Deposit & Trust Co. (June 31, 1970), *summarized in* R.L. Polk & Co., *Polk's World Bank Directory* 6 (Sept. 1970) (Massachusetts section) (stating that Boston Safe, as of June 30, 1970, had $6,600,000 of federal funds sales). The Board contends (Pet. Br. 43-44) that this fact should be ignored, suggesting that it was unknown to Congress and the Board. The legislative history does not indicate whether or not Congress knew of Boston Safe's investment activities, but the information was readily available if either were interested. If Congress verified these activities, that is the end of the debate. If Congress did not, two inferences can be drawn. First, Congress's might have considered such activities irrelevant because it was only interested in imposing the BHCA's requirements on commercial banks that offered "ordinary commercial loans." See 112 Cong. Rec. 12385 (1966) (comment of Sen. Robertson, noting that "the committee received evidence with respect to trust companies which do not make ordinary commercial loans"). Second, Congress might have failed to consider the possibility that the term "commercial loans" could be interpreted to include money market transactions and interbank transfers precisely *because* the term did not connote such activities. Thus, Boston Safe's transactions support a plain language interpretation of the term "commercial loan," regardless of whether Congress was aware of them or not.

ever, there is nothing unusual in Congress imposing greater regulation in certain provisions of an Act, while relaxing regulatory burdens in other provisions. Likewise, the Board's reliance (*ibid.*) on the House conferees' general observation that various exemptions should be construed narrowly, see H.R. Rep. 91-1747, 91st Cong., 2d Sess. 23 (1970), does not permit a construction at odds with the plain language of the statutory language.[23]

In sum, the plain meaning of Section 2(c) precludes the Federal Reserve Board's expansive redefinition of its operative terms "legal right to withdraw" and "commercial loans." Congress, through Section 2(c), has drawn a line in light of competing policies. The Board may not agree with that line, but it is obligated to respect it unless and until it is redrawn by Congress. Thus, the court of appeals correctly invalidated the Board's amended Regulation Y.

B. The Board's Power to Administer the Bank Holding Company Act Does Not Permit It to Expand the Scope of the Act's Coverage.

The United States, perhaps more than any other litigant, recognizes the importance of judicial deference to the effective functioning of administrative agencies. We have frequently argued before this Court and other tribunals that an agency's responsibility to administer a congressionally created program necessarily requires substantial latitude in interpreting uncertain statutory terms. But we also recognize that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative interpretations which are contrary to clear congressional intent." *Chevron U.S.A. Inc.*, slip op. 4 n.9. In the present

[23] Congress is aware of the distinctions between commercial loans and investment transactions; it generally indicates when it wishes non-loan extensions of credit included within a statutory provision. See *e.g.*, 12 U.S.C. 84 (lending limits apply to "[t]he total loans and extensions of credit by a national banking association * * *"); 12 U.S.C. 371c (restrictions on transactions with affiliates apply to "covered transactions" defined as, inter alia, "a loan or extension of credit to the affiliate"). See also 12 U.S.C. 1464(c) (distinguishing a savings and loan association's commercial loan activities from a variety of other loans and investments).

case, we believe that "the intent of Congress is clear," and "that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.* at 4.

In our view, the Board's expansive redefinition of the operative terms of Section 2(c) represents an " 'unauthorized assumption by an agency of major policy decisions properly made by Congress.' " *Bureau of Alcohol, Tobacco, & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). Indeed, the Board's brief is devoted in large part to contentions of policy (see Pet. Br. 18-27, 33-35, 44-46) rather than considerations of congressional intent.[24] One can debate the wisdom of the Board's policy analysis; there is ample room to dispute whether institutions that offer NOW accounts and engage in money market transfers should in the future be subject to the strictures of the BHCA. But that is not the point. The question before this Court is not the content of the debate but rather where it should take place. And the answer to that question is clear: "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *United States* v. *Rodgers*, No. 83-620 (Apr. 30, 1984), slip op. 8.

[24] The Board largely ignores the BHCA's specific statutory language; instead, it urges this Court (Pet. Br. 33) to rely on "the policies of the legislation as a whole," citing *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534 (1940). But as that case notes, "there is no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes." *Id.* at 543. Those words should be applied unless absurd results or consequences obviously at variance with the legislation will result. *E.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979). In the present case, the Board has failed to demonstrate absurdities or obvious variances; instead, it simply disagrees with the line Congress has drawn between "banks" and other institutions. But Congress exists to draw such lines. Indeed, it is altogether familiar for Congress to reconcile competing policies by drawing a line that might seem arbitrary if viewed solely from one particular policy perspective. See, *e.g.*, *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 220-223 (1980). If legislative compromise is to be respected, then those lines—until altered by Congress—must be observed.

Once the Board's unconvincing hermeneutical efforts are set aside, it becomes apparent that the Board's desire to redefine the content of Section 2(c) is based simply on its own policy preferences. The Board perceives changes in the financial services industry and believes that these changes should be addressed through regulatory redefinition of statutory terms. Its actions cannot be justified as necessary to prevent evasions of the Act.[25] No matter how persuasive its policy arguments and how well-intentioned its motives, the Board's action seriously undermines the legislative process. See *Rodgers*, slip op. 7-8.

[25] Section 5(b) of the BHCA authorizes the Board to issue regulations and orders necessary to carry out the purposes and prevent evasions of the Act. 12 U.S.C. 1844(b). The Board suggests at several junctures (Pet. Br. 17, 25, 33, 37-38) that its redefinition of the terms "legal right to withdraw" and "commercial loan" represents a valid exercise of that power. But Section 5(b) only empowers the Board to police the boundaries of the Act; it does not permit the agency to redraw the borders that Congress has plainly marked between "banks" and other financial institutions. See *FAIC Securities* v. *United States*, No. 84-5408 (D.C. Cir. July 26, 1985), slip op. 19 ("[a] general authority to define terms * * * does not confer power to *redefine* those terms that the statute itself defines"). At bottom, the Board simply claims that, because it has broad enforcement powers, it can enlarge the statute's prohibitions. Although the Board has indisputably broad authority within the four corners of the BHCA, it cannot expand the perimeters of the Act's coverage to reach conduct that Congress has plainly placed beyond its reach. A different case would be presented if Congress had phrased the scope of Act's coverage in uncertain terms, or had expressly delegated authority to the Board to define its outer contours. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 365-366 (1973) In the present case, Congress has set forth the outer reach of the Act with specificity.

Thus, the Board's reliance (Pet. Br. 37) on *Wilshire Oil Co.* v. *Board of Governors*, 668 F.2d 732 (3d Cir. 1981), cert. denied, 457 U.S. 1132 (1982), is misplaced. As the Board itself has recently explained, *Wilshire* involved the application of the Board's Section 5(b) powers in a situation "where a financial institution whose activities already satisfied the definition of a 'bank' sought to place itself outside the Act's coverage without altering any of the banking activities actually performed by the bank." Brief for Respondent Board of Governors at 28, *Florida Bankers Ass'n* v. *Board of Governors*, 760 F.2d 1135 (11th Cir. 1984), petition for cert. pending, No. 85-193. *Wilshire* does not support the Board's apparent position that Section 5(b) permits the Board to alter the statutory criteria for determining *whether* an institution is within or without the coverage of the Act.

"If, as petitioner contends, there is now a compelling need to fill the gap in the [agency]'s regulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found." *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 744-745 (1973). The court of appeals quite properly refused to give the Board license "to meet that need by rewriting the statute and legislative history [itself]." *Id.* at 745. The Board's perception of the need to regulate new and changing financial institutions cannot justify administrative amendment of longstanding legislation. See *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984) slip op. 11. ("It is for Congress, not the courts, to revise longstanding legislation in order to accommodate the effects of changing social conditions."). See also *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers Compensation Programs*, 461 U.S. 624, 635 (1983).

The Board's unilateral redefinition of the BHCA's reach is particularly troubling because it would dramatically change the present bank regulation scheme. Institutions that Congress expressly intended to exempt from the coverage of the BHCA, such as industrial banks (see note 12, *supra*) and trust institutions that do not engage in commercial lending (see note 22, *supra*) would be swept back within the coverage of the BHCA. Other state-insured institutions would be required to obtain FDIC deposit insurance (see 12 U.S.C. 1842(e)) even though they may be ineligible for insurance from that source. Thus, reasonable, industry-wide expectations will be disrupted.[26]

[26] The Board acknowledges that these disruptions would take place (Pet. Br. 45-46) but makes little effort to resolve the quandary it has created. It suggests that the institutions swept back within the Act "are not the same type of institutions that Congress intended to exclude" (Pet. Br. 13). But that, most certainly, is a determination for Congress. The Board suggests that it might grant "hardship" exemptions. 12 C.F.R. 225.21(b)(4); see 49 Fed. Reg. 799, 823 (1984). But that seems to be a doubtful solution; the District of Columbia Circuit has held that an agency cannot enact regulations otherwise beyond its authority by providing variances "that perhaps will be used to bring the agency's regulations within the boundaries established by the statute." *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1358-1359 (1980). Finally, the Board addresses the insurance issue by simply inviting Congress to cure the problem that the Board has created (Pet. App. 44a).

If "reasonable expectations are to be altered, that is a task for Congress, *J.W. Bateson Co.* v. *United States ex rel Board of Trustees,* 434 U.S. 586, 593 (1978)." *Morrison-Knudsen Construction Co.*, 461 U.S. at 636. Plainly, whether and how NBBs should be regulated are questions that fall squarely within the legislative domain. Congress is attentive to changes in the financial services industry; it has frequently modified the BHCA in response to the industry's evolution.[27] It is altogether proper to await congressional resolution of the NBB controversy, particularly since Congress, through recent deregulatory legislation, has itself encouraged many of the activities that the Board views as "evasions" of the BHCA. Indeed, Congress is presently considering BHCA amendments addressing the NBB issue that differ markedly from the Board's regulations.[28] Congressional deliberations should continue to conclusion unencumbered by agency ef-

---

[27] Congress amended Section 2(c) most recently in the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 333, 96 Stat. 1504; see 12 U.S.C. 1841(c), to prevent BHCA coverage of savings and loan institutions. The amendment was necessary to prevent coverage of savings and loan institutions under both the BHCA and the Savings and Loan Holding Company Act, 12 U.S.C. 1730a *et seq.* Under the Garn-St Germain Act, savings and loan associations received authorization to accept demand deposits from certain customers, see 12 U.S.C. 1464(b)(1)(A) and (B), and to make commercial loans, 12 U.S.C. 1464(c)(1)(R). Accordingly they "conceivably could be required to meet the requirements" of both Holding Company Acts. See S. Rep. 97-536, 97th Cong. 2d Sess. 55 (1982). The Board contends (Pet. Br. 46) that Congress's exemption of savings and loan associations creates an inference that Congress intended other institutions to be covered by the BHCA. The Board is, of course, plainly wrong—Congress found it necessary to exempt savings and loans because they now could offer conventional demand deposit accounts and make conventional commercial loans. Indeed, the Garn-St Germain Act supports just the opposite inference. The Act's provisions distinguish between savings accounts, (including NOW accounts), see 12 U.S.C. 1464(b)(1)(A) and (E)) and demand accounts, see 12 U.S.C. 1464(b)(1)(B). They also demonstrate that Congress is responsive to changes in the financial services industry and expands or contracts the BHCA's plain language as the need arises.

[28] For example, S. 2851, passed in the Senate at the close of the 98th Congress, defined the term "bank" to include FDIC insured institutions and

forts, however well intentioned, to forestall the legislative debate.[29]

In sum, it is clear that the Board has exceeded its authority and usurped congressional perogative by redefining, through amendments to Regulation Y, the operative terms of Section 2(c) of the BHCA. The court of appeals correctly invalidated the Board's action.

---

any institution that "accepts demand deposits or deposits that the depositor may withdraw by check or similar means * * * and is engaged in the business of making commercial loans." S. 2851, 98th Cong., 2d Sess. § 104(a)(1)(1982). But it defined "commercial loan" expressly to exclude investments such as commercial paper, certificates of deposit and other money market and interbank instruments. *Id.* § 104(a)(3). See 130 Cong. Rec. S11163 (daily ed. Sept. 13, 1984). Notably, both the Federal Reserve Board and the Department of the Treasury worked with the Senate Committee in formulating S. 2851 and both generally supported that legislation.

[29] The respondents note (Br. Opp. 12 n.17) that a number of individual legislators have questioned whether it was appropriate for the Board to promulgate regulations on an issue that is presently the subject of legislative debate—a debate that has entertained the views of the Federal Reserve Board and all other sectors of the banking community.

CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be affirmed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
JOHN F. CORDES
FREDDI LIPSTEIN
Attorneys
Department of Justice

ROBERT M. KIMMITT
General Counsel
MARGERY WAXMAN
Deputy General Counsel
MARY ANN GADZIALA
Senior Counsel for Banking
Department of Treasury

SEPTEMBER 1985